No. 75-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

TEXACO INC., TEXACO PUERTO RICO, INC., MOBIL OIL CORPORATION, MOBIL OIL CARIBE, INC., EXXON CORPORATION and ESSO STANDARD OIL S.A., LTD.,
Petitioners,

v.

FEDERAL ENERGY ADMINISTRATION and FRANK G. ZARB, Administrator, Federal Energy Administration,
Respondents,

UNITED STATES OF AMERICA, COMMONWEALTH OIL REFINING COMPANY and COMMONWEALTH OF PUERTO RICO,
Intervenor-Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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The petitioners, Mobil Oil Corporation, Mobil Oil Caribe, Inc., Exxon Corporation, Esso Standard Oil S.A., Ltd., Texaco Inc. and Texaco Puerto Rico, Inc., respectfully submit this brief in reply to arguments raised in the briefs of respondents Federal Energy Administration and Frank G.

Zarb, and intervenor-respondents United States of America, Commonwealth Oil Refining Company ("CORCO") and Commonwealth of Puerto Rico in opposition to the grant of a writ of certiorari in this case.

I

Published Notice Was Inadequate

The purpose of Section 4(b) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b)(3), is, petitioners submit, to provide for formal advance notice which will give fair warning to interested parties of proposed regulatory action which may adversely affect their interests. Therefore, the issue addressed in our Petition is whether the formal notice gave fair warning or indeed any warning at all of anything even remotely resembling the Shell subsidy order, which, if it was a price regulation, regulated to the detriment of petitioners the prices not of petitioners and other like "entities" referred to in the notice but rather of their supplier, CORCO, a refiner and already subject to the refiner rule; that CORCO was not an "entity" of a "firm" operating on the mainland was, as CORCO recognizes, the very reason that the Federal Energy Administration ("FEA") initially felt compelled to deal specially with the Puerto Rican petroleum market. (CORCO Brief at 4.)

II

The "Actual Notice" Exception Does Not Apply

The "actual notice" exception in Section 4(b) of the APA applies only in cases where there are named parties; this is not only the plain language of the statute but was clearly held by the Court of Appeals for the District of Columbia

Circuit in *Rodway* v. *United States Department of Agriculture*, 514 F.2d 809 (D.C. Cir. 1975). The fact that the Court in *Rodway* went on to find that there had been no actual notice either, and in that context used the language quoted in the Federal Respondents' Brief in Opposition (at 16, note 3) in no way detracts from the force of that primary holding.

III

FEA Did Not Comply With The Requirements For Immediate Effectiveness

The "substantial compliance" cases relied on by the Temporary Emergency Court of Appeals in support of its decision as to thirty-day effectiveness, and by the Federal Respondents in their brief, are in no way comparable to the present case. In *Nader* v. *Sawhill*, 514 F.2d 1064 (T.E.C.A. 1975), the agency *did* provide for immediate effectiveness and did in terms find good cause therefor, albeit in conclusory terms. And even in *California* v. *Simon*, 504 F.2d 430 (T.E.C.A.), *cert. denied*, 419 U.S. 1021 (1974), there was at least provision for immediate effectiveness, from which a finding of good cause might conceivably be inferred.[1] In this case, on the other hand, there was complete and utter non-compliance, so far as the action of FEA is concerned. It does not appear that FEA gave any consideration whatever to Section 4(c) of the APA, 5 U.S.C. § 533(d), or to its requirement that good cause be found for immediate effectiveness. Nor, petitioners submit, can it reasonably be concluded, as the Federal Respondents urge and the Temporary Emergency Court of Appeals intimated in its opinion, that a decision by the agency not to put the Shell subsidy into effect immediately would necessarily

1. Much the same could be said of De Rieux v. Five Smiths, Inc., 499 F.2d 1321 (T.E.C.A.), *cert. denied*, 419 U.S. 896 (1974), to the extent that it bears on the present issue.

have been irrational. Rather, it is perfectly obvious that the interim regulations in effect between March 20 and May 20, which eliminated the threat of a two-tiered system, but which did not impose the Shell subsidy, could have remained in effect for thirty more days.

IV

"Corporate Control" and "Preservation of Competition" Arguments do not Justify the Extraordinary Subsidy Awarded Shell at Petitioners' Expense

Respondents are at great pains to emphasize the brief existence of the subsidy to Shell (Puerto Rico) and its non-recurring nature. (*E.g.*, Federal Respondents' Brief at 13.) By inference, this stands as a reason for excusing non-compliance with the requirements of notice. However, it is precisely the *sui generis* character of the subsidy to Shell (Puerto Rico) which at once highlights the necessity of adherence to the requirements of proper notice and stands as telling evidence that such notice was lacking. Petitioners submit that such an extraordinary imposition would not have gone without comment had they been fully apprised of FEA's intentions. Further, the arguments advanced by respondents to support the Shell subsidy decision only serve to demonstrate its irrationality.

The fact that Shell as a firm (*i.e.*, the Royal Dutch/Shell group) is controlled from abroad whereas control of petitioners and others of Shell's competitors is lodged in the United States is in itself no reason why Shell should be singled out for special and preferential treatment where regulation of business and activities carried on in the United States is involved. This has, of course, long been recognized by FEA, by its predecessor the Federal Energy Office, and by the Cost of Living Council under the Economic Stabilization Act of 1970, so far as operations within

the United States proper are concerned. No reason beyond a bald *ipse dixit* has ever been suggested why any different principles should have been applied to operations in Puerto Rico, after it became a part of "the United States" for purposes of the regulatory system. See Section 3(7) of The Emergency Petroleum Allocation Act (the "Act"), 15 U.S.C. § 752(7) (Supp. 1976).

In its Brief in Opposition, Commonwealth of Puerto Rico suggests (at 8) that all the agency did was to limit ". . . exercise of its control over this most complex world-wide industry to those companies doing business in the United States." But every motorist has seen with his own eyes (and the record in this case makes it abundantly clear) that Shell as a "firm" (10 C.F.R. § 212.83(b)) does business in the United States, as well as in Puerto Rico, in precisely the same way as the petitioners and, except for this particular regulation, Shell's business in the United States is subject to the same rules, supposedly applied in the same way, as are the petitioners' like businesses in the United States. The only real difference between Shell and the petitioners would seem to be that in the case of Shell the principal United States components of the firm are not wholly-owned within the group whereas in the case of petitioners they are. But this has nothing whatever to do with the fact that the ultimate control of Shell is in foreign hands, and would seem, moreover, to be ruled out as a distinguishing factor by the very definition of "firm."

One other point must be made about the substantive issue, and that derives from the extraordinary—indeed unique—nature of the regulation itself.

The regulation imposing the Shell subsidy did three things:

First, by subjecting the petitioners Texaco Puerto Rico, Inc., Mobil Oil Caribe, Inc. and Esso Standard Oil S.A., Ltd.

to the refiner rule it required them to sell the product they purchased from CORCO for less than they paid for it.

Second, to enable Shell, excepted from the application of the refiner rule, to continue to sell at a price competitive with petitioners and others in the market and still achieve its accustomed margin of profit, CORCO was directed to sell its product at a price sufficiently below the prices charged petitioners to provide the necessary spread and was authorized to pass through its unrecouped costs on product so sold to Shell to its other customers including petitioners.

Third, as subsequently interpreted by the agency and held by the district court below, the regulation impliedly nullified the existing contracts between CORCO and two of the petitioners (to the extent necessary to permit Shell's costs to be passed through to them), although the usual practice of FEA and of the Cost of Living Council before it had been not to set aside pre-existing contracts calling for a price lower than the ceiling price.

It is submitted that a regulation which creates such a competitive advantage where none had previously existed, in favor not of a small or independent refiner (for which the Act makes special provision), but rather in favor of what is probably world-wide the second largest of the "majors," and in Puerto Rico and the United States market generally a significant factor, which does so by imposing on CORCO a system of price discrimination, and which gives no hint of consideration of its possible anticompetitive effects—such a regulation, petitioners submit, urgently calls for and should only be upheld if supported by the most cogent justification. The conclusory statement in FEA's order promulgating the Shell subsidy (Petitioners' Appendix at 13a) strongly suggests that no consideration was given to these collateral consequences. Had notice been given in compliance with the statutory requirements, these consequences could and should have received full consideration.

Conclusion

For the reasons set forth above and in the Petition, the writ of certiorari should be granted and the judgment of the Temporary Emergency Court of Appeals reversed.

Respectfully submitted,

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